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No. 93-1961

In the Supreme Court of the United States

OCTOBER TERM, 1994

LESTER V. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Constitution entitles a defendant in a criminal case to jury instructions defining the term "reasonable doubt."

2. Whether the Constitution entitles a defendant in a criminal case to present argument to the jury concerning the meaning of the term "reasonable doubt."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the judgment is noted at 21 F.3d 426 (Table).

JURISDICTION

The opinion of the court of appeals was issued on April 13, 1994. The petition for a writ of certiorari was filed on June 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an attorney, was charged with two counts of willfully attempting to evade income tax, in violation of 26 U.S.C. 7201, and two counts of willfully filing fraudulent amended tax returns, in violation of 26 U.S.C. 7206(1). Petitioner's first trial ended in a mistrial when the jury was unable to reach a verdict. At a second trial petitioner was convicted on the tax evasion counts and acquitted on the fraudulent return counts. Petitioner was sentenced to 18 months' imprisonment and a fine.[1] The court of appeals affirmed. Pet. App. 1a-6a.

1. Between 1982 and 1984, petitioner operated a successful law practice in Bel Air, Maryland. Gov't C.A. Br. 4; C.A. App. 40-41. Petitioner reported taxable income of $51,000 for 1983 and $50,000 for 1984, although his true taxable income for those years was $164,000 and $230,000. Gov't C.A. Br. 9. Petitioner consistently and accurately informed various financial institutions from which he was requesting loans that his net annual income ranged between $150,000 and $200,000. During the same time period, petitioner spent more than $410,000 on purchases of a variety of items including automobiles and condominiums. *Id.* at 9-10.

In the spring of 1986, the Internal Revenue Service audited petitioner's 1984 tax return. Although petitioner informed the IRS auditor that he had deposited all of his 1983-1984 gross receipts from his law practice into a single business account, that account actually contained only a portion of petitioner's fees. Petitioner had also

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[1] Citing the poor health of petitioner's wife and daughter, the district court later reduced the sentence. As a result of the court's action, petitioner served only six months' imprisonment. Pet. App. 19a-20a.

deposited hundreds of thousands of dollars into various personal accounts and had failed to report that income on his tax returns. In addition, petitioner had not reported all of the income deposited into the business account. Gov't C.A. Br. 4-5, 8.[2] After the IRS corrected his gross receipts and taxable income, petitioner owed approximately $135,000 in additional tax for 1983-1984. *Id.* at 8-9.

In the fall of 1986, after the IRS's civil auditor had referred petitioner's case to the IRS Criminal Investigation Division, petitioner filed amended 1983-1984 tax returns. On those amended returns, petitioner did not report as gross receipts the full amount of his cash fees or the proceeds of certain fee checks that he had cashed but not deposited. Gov't C.A. Br. 5-6.

2. In March 1991, a federal grand jury returned an indictment charging petitioner with attempted tax evasion for 1983-1984 and with willfully filing false 1983-1984 amended returns.[3] Gov't C.A. Br. 2; see 26 U.S.C. 7201, 7206(1). Petitioner's July 1991 trial ended in a mistrial when the jury was unable to reach a verdict. *Id.* at 3.

During his retrial, which occurred during a three-week period in April 1992, petitioner did not dispute the existence or the amount of his understated income, nor did he testify or call any witnesses on his own behalf. His defense, which he presented in both his opening statement and his closing argument, was that the

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[2] Petitioner reported gross receipts of $171,200 for 1983 and $184,500 for 1984. His correct gross receipts for those years were, respectively, $332,000 and $448,000. Gov't C.A. Br. 8.

[3] Although the government offered substantial evidence regarding petitioner's 1982 tax year in order to establish a pattern of unreported income, the statute of limitations barred any charges relating to that year. Gov't C.A. Br. 2 n.1.

government had failed to prove his guilt beyond a reasonable doubt. Pet. 2-3; C.A. App. 34-37, 213-217.

During the court's charge conference, petitioner requested that the district court define the term "reasonable doubt" in its jury instructions. The court refused to give petitioner's requested instruction, which defined "reasonable doubt" largely in terms of a hesitancy to act in important matters. The court explained that giving the instruction was prohibited by existing circuit precedent. In instructing the jury, however, the court repeatedly stated that petitioner was presumed innocent and that the government bore the burden of proving his guilt beyond a reasonable doubt. See C.A. App. 24, 203-210, 224-227, 234, 237-240, 245, 247.

In addition to requesting a jury instruction defining reasonable doubt, petitioner requested that the district court allow him to define the term in his closing argument to the jury. The court stated that petitioner could present a portion of his proposed definition, to the effect that "reasonable doubt" did not require the government to prove "its case to a mathematical certainty," but refused to allow him to argue the remainder, which stated that "reasonable doubt" was "any concern of the kind that would cause you to hesitate in the most important of your own personal or family or business or job situations." C.A. App. 211. Petitioner rejected the option offered by the court. *Id.* at 212. The court also allowed petitioner in his closing argument to explain "reasonable doubt" in "precisely the same words" as he had used in his opening statement. *Id.* at 208. Petitioner presented an extensive closing argument, in which he repeatedly stressed the presumption of innocence and the government's burden of proving his guilt beyond a reasonable doubt. *Id.* at 213-217. He also repeated the gist of a metaphor that he had used during

his opening statement, to the effect that "a reasonable doubt means that * * * if it is anywhere near close, the Government hasn't made its case. They have to throw us out by a mile, to use a baseball metaphor." Pet. App. 4a-5a, 42a.

The jury convicted petitioner of the two evasion counts and acquitted him of the two false filing counts. The court sentenced petitioner to 18 months' imprisonment and required him to pay a $25,000 fine. Pet. App. 10a-12a.

3. Petitioner appealed, contending that the district court had erroneously refused to define reasonable doubt in its jury instructions and had improperly refused to allow him to argue the meaning of the term in his closing argument. Pet. C.A. Br. 7-8. Acknowledging that the court of appeals had previously "ruled against the position advanced in [his] appeal," petitioner included a suggestion for en banc review in his appellate brief. *Id.* at 8-9.

After the court of appeals denied en banc review, see Pet. App. 7a-8a, a panel affirmed petitioner's conviction in an unpublished per curiam opinion. *Id.* at 1a-6a. Stating that it had "never found a refusal of a party's request for a clarifying instruction to be error," the court reaffirmed its "longstanding, albeit forgiving, proscription against any attempts to define reasonable doubt to jurors." *Id.* at 5a-6a. The court also rejected petitioner's contention regarding the limitation placed on his closing remarks, explaining that the court had "consistently" allowed district courts to prohibit counsel from defining reasonable doubt in their arguments to the jury. *Id.* at 6a.

ARGUMENT

1. Although the reasonable doubt standard "is an ancient and honored aspect of our criminal justice system," *Victor* v. *Nebraska*, 114 S. Ct. 1239, 1242 (1994), this Court has noted that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Holland* v. *United States*, 348 U.S. 121, 140 (1954). [4] For that reason, many courts of appeals have expressed the view that the "purposes of having juries may be best served if juries, in the first instance, bear the responsibility for defining" reasonable doubt. *E.g.*, *United States* v. *Taylor*, 997 F.2d 1551, 1558 (D.C. Cir. 1993); *United States* v. *Nolasco*, 926 F.2d 869, 871-873 (9th Cir.) (citing cases), cert. denied, 112 S. Ct. 111 (1991).

That approach is consistent with this Court's recent decision in *Victor* v. *Nebraska*, in which the Court stated:

> The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs the

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[4] This case illustrates that point nicely. The instruction requested by petitioner defined "reasonable doubt" as, *inter alia*, "a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life." C.A. App. 24. Petitioner contends that the district court's refusal to give that instruction was constitutional error. Justice Ginsburg and other federal jurists, however, have specifically criticized the "hesitate to act" formulation as unhelpful and confusing to the jury, and potentially prejudicial to the defendant. See *Victor* v. *Nebraska*, 114 S. Ct. at 1252 (Ginsburg, J., concurring in part and concurring in the judgment).

> jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.

114 S. Ct. at 1243 (citations, brackets, and internal quotation marks omitted).

The court's jury instructions in petitioner's case suffered from no constitutional infirmity. In instructing the jury, the district court mentioned the reasonable doubt standard at least 18 times and was careful to explain that the government bore the burden of proof. C.A. App. 222-251. The court stated, for example, that:

> As a result of the defendant's plea of not guilty, the burden is on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant for the simple reason that the law never imposes upon a defendant in a criminal case, the burden or duty of calling any witness or producing any evidence.
>
> The law presumes the defendant to be innocent of all charges against him. I therefore instruct you that the defendant is presumed by you to be innocent until such time, if ever, you as the jury are satisfied that the government has proven him guilty beyond a reasonable doubt.
>
> The defendant begins the trial here with a clean slate. This presumption of innocence alone is sufficient to acquit a defendant unless you as jurors are unanimously convinced beyond a reasonable doubt

> of his guilt, after a careful and impartial consideration of all of the evidence in this case. If the government fails to sustain its burden, you must find the defendant not guilty.
>
> This presumption was with the defendant when the trial began and remains with him even now as I speak to you and will continue with the defendant into your deliberations unless and until you are convinced that the government has proven his guilt beyond a reasonable doubt.

Id. at 225-226. The court went on to instruct, *inter alia*, that the government was required to establish each element of petitioner's charged offenses "beyond a reasonable doubt," *id.* at 227, 237-240, and that the jury must find petitioner not guilty if it was not convinced of his guilt "beyond a reasonable doubt" after weighing all the evidence, *id.* at 227. These instructions correctly apprised the jury of the government's burden of proof and "conve[yed] the concept of reasonable doubt to the jury." *Victor* v. *Nebraska*, 114 S. Ct. at 1243.

Nor is this Court's review warranted to resolve "a conflict among the federal Courts of Appeals" (Pet. 19) on whether a definition of reasonable doubt should be provided when requested by a defendant. Although various federal courts of appeals and state courts have given different directions to trial courts within their jurisdictions regarding whether to define the term "reasonable doubt" and what verbal formulations to use,[5]

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[5] The majority of the federal courts of appeals to consider the issue have either discouraged defining the term or have left the matter to the discretion of the trial court. See, *e.g.*, *United States* v. *Reives*, 15 F.3d 42, 44 n.1, 45 (4th Cir.) (condemns giving

this Court made clear in *Victor* that the Constitution does not require that the term be defined or that any particular formulation be used. 114 S. Ct. at 1243.[6] Nor do the differences in the prescribed verbal formulations among the lower courts call for this Court's review. Preferences as to the appropriate language to be used to define a term such as reasonable doubt—when the choices are all within constitutionally permissible bounds—are matters properly left to the individual choice of the lower appellate courts in the exercise of their supervisory powers over the trial courts within their jurisdictions.

2. There is no merit to petitioner's assertion (Pet. 15) that the district court refused to permit him to present "any meaningful argument to the jury on the meaning of

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definition but leaves decision to do so with trial court), cert. denied, 114 S. Ct. 2679 (1994); *United States* v. *Taylor*, 997 F.2d 1551, 1557-1558 (D.C. Cir. 1993) (district court "need not give any definition of reasonable doubt at all"); *United States* v. *Nolasco*, 926 F.2d 869, 872 (9th Cir.) (definition is permissible but not required) (en banc), cert. denied, 112 S. Ct. 111 (1991); *United States* v. *Olmstead*, 832 F.2d 642, 646 (1st Cir. 1987) (instruction using words "reasonable doubt" without further definition adequately apprises the jury of the proper burden of proof), cert. denied, 486 U.S. 1009 (1988); *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1060-1061 (5th Cir.), cert. denied, 483 U.S. 1035 (1987); *United States* v. *Lawson*, 507 F.2d 433, 442 (7th Cir. 1974) (trial judge has option to define), cert. denied, 420 U.S. 1004 (1975); cf. *Whiteside* v. *Parke*, 705 F.2d 869, 871-872 (6th Cir.) (using "totality of circumstances" approach to determine whether failure to define was constitutional violation), cert. denied, 464 U.S. 843 (1983).

[6] Of course, this Court's decision in *Victor* does not prevent the States from requiring, as a matter of their own law, that such an instruction be given. Nor did the Court forbid district courts to give such instructions in federal criminal trials; it simply made clear that instructions of the sort requested by petitioner are not constitutionally required.

the reasonable doubt standard" and thereby abridged his constitutional rights. The record shows (C.A. App. 213-217) that, far from being prevented from making his point, petitioner was permitted to present an extensive closing argument in which he repeatedly asserted that the government had failed to overcome his presumption of innocence by proving his guilt "beyond a reasonable doubt." Because it is the role of the court, not counsel, to explain the law to the jury, the district court's refusal to allow petitioner to argue his own definition of reasonable doubt fell well within the court's broad discretion to control closing argument in order to ensure "that [it] d[id] not stray unduly from the mark." *United States* v. *Wables*, 731 F.2d 440, 449 (7th Cir. 1984), quoting *Herring* v. *New York*, 422 U.S. 853 (1975); *United States* v. *Crockett*, 813 F.2d 1310, 1317 (4th Cir.) (no abuse of discretion in trial court's refusal to allow defendant to define reasonable doubt in closing argument), cert. denied, 484 U.S. 834 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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